

Louisiana Law Review

Volume 25 | Number 2

Symposium Issue: The Work of the Louisiana Appellate

Courts for the 1963-1964 Term

February 1965

Insurance and the Community

Richard B. Wilkins Jr.

Repository Citation

Richard B. Wilkins Jr., *Insurance and the Community*, 25 La. L. Rev. (1965)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol25/iss2/25>

This Comment is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

COMMENTS

INSURANCE AND THE COMMUNITY

The community property system originated in the customary law of the Middle Ages and was included in codifications of the civil law.¹ With the exception of marine insurance, insurance law had its origins in the common law of contracts² and did not develop extensively in this country until the early nineteenth century.³ It seems probable that the community property provisions of the Louisiana Civil Code were not drafted with insurance in mind since at the time of the adoption of the Code Napoleon and the first Civil Code of Louisiana, a contract of life insurance was a prohibited wagering contract in France.⁴

This Comment investigates the relationship between the two systems of law, conflicts which have developed, and the harmony that can be achieved. The most important question in most cases is whether a policy of insurance or the proceeds payable thereunder should be characterized as property of the community existing between the spouses or the separate property of one spouse.

The discussion will follow the broad distinction between property insurance, which is based on a contract to indemnify or restore a loss of property, and personal insurance, which is not a contract of indemnity. As health insurance cannot exactly be classified under either of these categories, it will receive separate treatment.

1. See 3 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 891 (1959). See generally 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY §§ 7-8 (1943); MCKAY, COMMUNITY PROPERTY §§ 1-9, 15-32 (2d ed. 1925).

2. See *Lambert v. Penn Mut. Life Ins. Co.*, 50 La. Ann. 1027, 1040, 24 So. 16, 23 (1898) (concurring opinion by Miller, J.); VANCE, INSURANCE §§ 2-4 (3d ed. 1951).

3. The first case to reach a court of last resort in the United States was *Lord v. Dall*, 12 Mass. 115, 7 Am. Dec. 38 (1815). See VANCE, INSURANCE § 4 (3d ed. 1951).

4. See *Lambert v. Penn Mut. Life Ins. Co.*, 50 La. Ann. 1027, 1040, 24 So. 16, 23 (1898) (concurring opinion by Miller, J.).

I. PERSONAL INSURANCE

A. *The Character of Life Insurance — Policy and Proceeds*

A life insurance policy is property⁵ in the nature of a non-negotiable, incorporeal, personal right,⁶ even before the death⁷ of the *cestui que vie*.⁸ While it is true that a right to the proceeds is exigible only upon the death of the *cestui que vie*, a property right in the policy itself exists prior to his death. This latter right embraces the lifetime benefits such as the options to borrow against the policy, to surrender it and receive its cash surrender value, to receive dividends, or to pledge it to a third person as security for a debt.⁹ Thus, it is necessary to characterize both the policy itself and the proceeds which may be payable upon the occurrence of the event insured against as either separate or community property.¹⁰ The distinction between these characterizations should be borne in mind throughout this discussion, as it seems to be the key to the Louisiana jurisprudence.¹¹

5. The early case of *Succession of Hearing*, 26 La. Ann. 326 (1874) contains a contrary statement which, although not expressly overruled, has never been followed. See, e.g., *In re Moseman*, 38 La. Ann. 219 (1886). It seems elemental, however, that reciprocal rights and obligations under a contract of insurance are things susceptible of ownership. See VANCE, *INSURANCE* § 13 (3d ed. 1951).

6. See LA. CIVIL CODE arts. 460, 470, 475, 870 (1870); *Messersmith v. Messersmith*, 229 La. 495, 86 So.2d 169 (1956).

7. See *Succession of Kugler*, 23 La. Ann. 455 (1871).

8. Four different persons may be referred to in a life insurance contract: the insurer, the insured (who is the person contracting with the insurer), the *cestui que vie* (whose life forms the subject of the policy, and for whose death the proceeds may be claimed), and the beneficiary. In the case of an individual procuring insurance on his own life, payable to some beneficiary, it is unnecessary to distinguish between the insured and the *cestui que vie*, since they are one and the same. But since a person may insure the life of any person in whom he has an insurable interest, it is necessary to distinguish between the party contracting with the insurer and the party whose life is the subject of the policy. See PATTERSON, *ESSENTIALS OF INSURANCE LAW* 156 (2d ed. 1957).

9. See, for example, the ordinary (whole) life insurance policy used by the Equitable Life Assurance Society of the United States in PATTERSON & YOUNG, *INSURANCE* 726 (4th ed. 1961).

10. Although the cases do not advert to this distinction, it was suggested by the early case of *Succession of Hearing*, 26 La. Ann. 326 (1874), where the policy was clearly an asset of the community, but the court held the proceeds, when due, fell into the separate estate of the beneficiary. See *Pollock v. Pollock*, 164 La. 1077, 115 So. 275 (1928); *Succession of Desforgues*, 135 La. 49, 64 So. 978 (1914); *Lambert v. Penn Mut. Life Ins. Co.*, 50 La. Ann. 1027, 24 So. 16 (1898); *Pilcher v. New York Life Ins. Co.*, 33 La. Ann. 322 (1881); *Succession of Bofenschen*, 29 La. Ann. 711 (1877); cf. *Easterling v. Succession of Lamkin*, 211 La. 1089, 31 So.2d 220 (1947).

11. The distinction has been made more important by the almost universal practice by insureds of reserving the right to change beneficiaries. Before this practice came into common usage, the insured who did not reserve the right caused the contingent right to the proceeds to be vested in the named beneficiary. Although the insured had a right in the policy, consisting of the lifetime benefits

Because of the number of persons who may have an interest in a policy of life insurance, and in the proceeds of it when due,¹² many combinations of circumstances may arise. Proper analysis demands that the character of the policy itself be first determined to ascertain ownership of the lifetime benefits. Moreover, the characterization of the policy sometimes has a bearing upon the characterization of the proceeds or death benefits.

1. *The Life Insurance Policy Itself*

To facilitate discussion of the property characteristics of life insurance policies a distinction will be made in accordance with the well-settled general rule which holds that the time of issuance of the policy controls its classification as separate or community: a policy taken out before marriage is the separate property of the insured; a policy taken out during marriage forms part of the community's assets.¹³ If the community is dissolved while both spouses are still living, the characterization of policies is of the utmost importance. On the other hand, if the community is dissolved by the death of the *cestui que vie*, the characterization is normally of little interest, since the policy is terminated by the same event which destroys the community. In the latter case, the only time the classification of the policy will be important is when the proceeds are payable to the insured's estate.¹⁴

a. *Taken Out Before Marriage.* — The theoretical justification for the rule that a policy of life insurance taken out before the marriage is the separate property of the spouse who pro-

(cash surrender, loan value, dividends) and death benefits (under the usual beneficiary clause) when the beneficiary dies before the insured and no other beneficiary is designated, it was of limited value without the right to direct the proceeds notwithstanding the wishes of the beneficiary. Thus, the characterization of the policy itself was immaterial to the characterization of the proceeds payable thereunder. Compare *Pollock v. Pollock*, 164 La. 1077, 115 So. 275 (1928), with *Pilcher v. New York Life Ins. Co.*, 33 La. Ann. 322 (1881). See VANCE, *INSURANCE* § 106 (3d ed. 1951).

12. See note 8 *supra*. The possible beneficiaries are the insured's spouse, the insured's own estate, or a third person.

13. The rule was considered well settled by the court in *In re Moseman*, 38 La. Ann. 219 (1886), and has been followed consistently. The apparent bases of the rule are the notions expressed by the Civil Code that property owned by a spouse prior to marriage remains the separate property of that spouse, property acquired by the reciprocal industry of the spouses during the marriage makes up the community, and upon dissolution of the community a legal presumption exists in favor of community ownership of property. LA. CIVIL CODE arts. 2334, 2402, 2405 (1870).

14. See notes 50 and 51 *infra*.

cures it¹⁵ seems to be by analogy to any other type of property owned prior to the marriage which has not lost its separate identity during the marriage, and thus is separate property under the provisions of article 2334.¹⁶ Often, the insured with a separate policy who has subsequently married will change beneficiaries to favor his spouse. This act of the insured will not change the character of the policy itself even though community funds are used to maintain the policy in force.¹⁷

Problems could arise, however, when community funds are used to maintain in force a separate policy. The rule seems to have been settled that under such circumstances, the community is entitled to be reimbursed for the premiums paid.¹⁸ Although no case has adverted to it, justification for this rule may lie in article 2408,¹⁹ which regulates the responsibility of a spouse to the community for benefits to his separate estate received from

15. See *In re Moseman*, 38 La. Ann. 219 (1886).

16. LA. CIVIL CODE art. 2334 (1870), in part: "The property of married persons is divided into separate and common property.

"Separate property is that which either party brings into the marriage, or acquires during the marriage with separate funds, or by inheritance, or by donation made to him or her particularly."

17. The basis for this rule is the insured's reservation of the right to change beneficiaries. Thus, if the insured redesignates his own estate at a latter date, or if the named beneficiary predeceases the insured and the policy provides that the proceeds are to be paid to the insured's estate, then the proceeds will be paid into his separate estate. This is a necessary implication of *In re LeBourgeois*, 144 La. 501, 80 So. 673 (1919). Cf. *Succession of Lewis*, 192 La. 734, 189 So. 118 (1939); *Succession of Verneuille*, 120 La. 605, 45 So. 520 (1908); *In re Moseman*, 38 La. Ann. 219 (1886).

18. *Succession of Lewis*, 192 La. 734, 189 So. 118 (1939); *Succession of LeBlanc*, 142 La. 27, 76 So. 223 (1917); *Succession of Verneuille*, 120 La. 605, 45 So. 520 (1908).

The topic of reimbursement has been the subject of two excellent articles: Huie, *Separate Ownership of Specific Property Versus Restitution from Community Property in Louisiana*, 26 TUL. L. REV. 427 (1952); Huie, *Separate Claims to Reimbursement from Community Property in Louisiana*, 27 TUL. L. REV. 143 (1953).

The principle of reimbursement has been objected to on the ground that it justifies the husband, who acts as the head and master of the community, in utilizing community property to further his own ends, in much the same way that a fiduciary might use the funds in his control to increase the value of his own holdings. See 1 DE FUNIAK, *PRINCIPLES OF COMMUNITY PROPERTY* § 79 (1943).

19. LA. CIVIL CODE art. 2408 (1870), in part: "When the separate property of either the husband or the wife has been increased or improved during the marriage, the other spouse, or his or her heirs, shall be entitled to the reward of one half of the value of the increase or ameliorations, if it be proved that the increase or ameliorations be the result of the common labor, expenses or industry."

See Nabors, *Civil Law Influences Upon the Law of Insurance in Louisiana—Life Insurance Problems Under the Community Property System*, 6 TUL. L. REV. 515, 540 (1932). It may be that article 2408 is not the basis for the principle of reimbursement at all if it is merely an application of the general principle of accession to the law of community property. Cf. LA. CIVIL CODE arts. 504, 508, 520-532 (1870).

the community. It may be argued that article 2408 is not entirely applicable, for a strict application of it seems to suggest that the proceeds paid under the policy are such an "increase" of the separate property of the beneficiary as to make them liable for the return to the other spouse of "one half of the value of the increase."²⁰ This argument was laid to rest in the early case of *In re Moseman*.²¹ The policy was found to be the separate property of the husband but on a showing that the policy was kept in force during the marriage with community funds, the case was remanded to the trial court for the purpose of determining the amount the community paid as premiums during its existence.²²

b. Taken Out During Marriage. — Civil Code articles 2402, 2405 and 2334²³ provide that the community shall consist of the estate which the parties acquire during the marriage even though the acquisition may be in the name of only one of them, and further that upon dissolution of the community all effects which they possess are presumed to be common effects, in the absence of proof of its acquisition as separate property and with separate funds. These articles form the basis for the character-

20. LA. CIVIL CODE art. 2408 (1870).

21. 38 La. Ann. 219 (1886). See Succession of Lewis, 192 La. 734, 189 So. 118 (1939); Succession of Verneulle, 120 La. 605, 45 So. 520 (1908); cf. Succession of Brownlee, 44 La. Ann. 917, 11 So. 590 (1892).

22. *In re Moseman*, 38 La. Ann. 219, 223 (1886). Other community property jurisdictions do not use the reimbursement solution. California, for example, holds that the community will be allowed to share in the proceeds in the proportion that the amount of the community funds used in paying premiums bears to the total amount of premiums paid. See *McBride v. McBride*, 11 Cal. App. 2d 521, 54 P.2d 480 (1936); *Modern Woodmen of America v. Gray*, 113 Cal. App. 729, 299 Pac. 754 (1931); 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY § 79 (1943).

23. LA. CIVIL CODE art. 2402 (1870): "This partnership or community consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and of the estate which they may acquire during the marriage, either by donations made jointly to them both, or by purchase, or in any other similar way, even although the purchase be only in the name of one of the two and not of both, because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase. . . ."

Id. art. 2405: "At the time of the dissolution of the marriage, all effects which both husband and wife reciprocally possess, are presumed common effects or gains, unless it be satisfactorily proved which of such effects they brought in marriage, or which have been given them separately, or which they have respectively inherited."

Id. art. 2334, in part: "The property of married persons is divided into separate and common property."

"Separate property is that which either party brings into the marriage, or acquires during the marriage with separate funds, or by inheritance, or by donation made to him or her particularly."

ization of a life insurance policy taken out during the marriage as community property.²⁴ No case has been found in which either spouse procured a policy during the marriage intending that it be his separate property. However, there seems to be no principle to prevent such an acquisition if the spouse can supply sufficient proof that it was paid for with separate funds, and that it was intended to be separate property. If the husband has acquired the policy it might be argued that he ought to comply with the strict requirements of the double declaration in the contract, as is certainly the case in the acquisition of immovables,²⁵ that the funds were his separate property and that the purchase was made for his individual account. It seems, however, that such an application would be an unjustifiable extension of a rule which may not be applicable at all to acquisitions of movables.²⁶ On the other hand, if the wife has taken out the policy, she should certainly be allowed to prove by any means that it was acquired with her separate funds, and is thus separate property.²⁷

2. *The Proceeds of a Life Insurance Policy*

The rules governing the characterization of the proceeds of a life insurance policy perhaps create the greatest conflicts with the principles of community property. Although the cases do not so generalize, the characterization of the proceeds seems to depend upon the types of beneficiary named in the policy. The types are three in number: a third person, the insured's spouse, and the insured's estate.

It should be noted that since 1914²⁸ the proceeds of life insurance policies are exempt by statute from the claims of creditors of either the insured or of the community.

a. Payable to a Third Person. — The husband has virtually unlimited power to name anyone as beneficiary of a life insurance policy procured by him, and no reimbursement of premiums

24. See *Thigpen v. Thigpen*, 231 La. 206, 91 So.2d 12 (1956).

25. See, e.g., *Sharp v. Zeller*, 110 La. 61, 34 So. 129 (1902).

26. See Comment, 25 LA. L. REV. 95 (1964).

27. This rule is generally applicable in relation to acquisitions by the wife. See Comment, 25 LA. L. REV. 95 (1964).

28. La. Acts 1914, No. 189, § 1: "[T]he proceeds or avails of all life, including fraternal and co-operative, health and accident insurance shall be exempt from all liability for any debt, except for a debt secured by a pledge of such policy, or any rights under such policy that may have been assigned; or any advance payments made on or against such policy." The provision now appears in much broadened form as LA. R.S. 22:647 (Supp. 1963), as amended.

is due the community even though all premiums are paid from community funds.²⁹ It has been suggested that the theoretical justification for the rule can lie only in article 2404³⁰ which prohibits the husband as head and master of the community from making *excessive* gifts to third persons from community funds.³¹ In answering attacks on the rule pitched upon this restriction on donations, the courts have been unequivocal:

"[A] life insurance policy is a contract *sui generis*; governed by rules peculiar to itself, the outgrowth of judicial precedent and not of legislation. . . [T]he Court has repeatedly refused to apply to such policies the provisions of the Civil Code relative to donations *inter vivos*."³²

Thus it has been held that a policy of life insurance was not revocable under article 1749 when made payable to the other spouse,³³ that a policy is not subject to collation under article 1228 when made payable to children of the marriage,³⁴ that a policy is not reduceable as impinging upon the rights of forced heirs,³⁵ and that a policy is not subject to the prohibition of article 1481, which limits donations to a concubine to one-tenth of

29. See, e.g., *Sizeler v. Sizeler*, 170 La. 128, 127 So. 388 (1930); VANCE, INSURANCE § 105 (3d ed. 1951).

30. LA. CIVIL CODE art. 2404 (1870) forbids the husband to make a gift *inter vivos* "of the whole, or of a quota of the movables, unless it be for the establishment of the children of the marriage," but further provides "nevertheless he may dispose of the movable effects by a gratuitous and particular title to the benefit of all persons."

31. Nabors, *Civil Law Influences Upon the Law of Insurance in Louisiana—Life Insurance Problems Under the Community Property System*, 6 TUL. L. REV. 515 (1932). This interpretation of article 2404 is probably erroneous, because the article expressly allows donations by particular title of movables of the community, and prohibits universal donations and donations by universal title of community movable effects.

32. *Ticker v. Metropolitan Life Ins. Co.*, 11 Orl. App. 55, 59 (La. App. Orl. Cir. 1914), approved, *Sizeler v. Sizeler*, 170 La. 128, 130, 127 So. 388 (1930). In *Sherwood v. New York Life Ins. Co.*, 166 La. 829, 834, 118 So. 35, 37 (1928) the court said: "It is the settled jurisprudence of this court that life insurance policies are neither donations *inter vivos* nor *mortis causa*, and that the provisions of the Civil Code relative to donations and collation will not be applied to such policies."

33. *Lambert v. Penn Mut. Life Ins. Co.*, 50 La. Ann. 1027, 24 So. 16 (1898); *Putnam v. New York Life Ins. Co.*, 42 La. Ann. 739, 7 So. 602 (1890); *Pilcher v. New York Life Ins. Co.*, 33 La. Ann. 322 (1881). LA. CIVIL CODE art. 1749 (1870), which provided that all donations between married persons during marriage, though termed *inter vivos*, were revocable before the death of the donor, was repealed by La. Acts 1942, No. 187, in order to avoid federal estate tax liability for the donor. See LA. R.S. 9:2351-2353 (1950); Comment, 1 LOYOLA L. REV. 194 (1942).

34. *Sherwood v. New York Life Ins. Co.*, 166 La. 829, 118 So. 35 (1928).

35. *Sizeler v. Sizeler*, 170 La. 128, 127 So. 388 (1930); *Sherwood v. New York Life Ins. Co.*, 166 La. 829, 118 So. 35 (1928).

the movable estate of the donor.³⁶ Since the enactment of Act 292 of 1940³⁷ it has been clear that the provisions of the Civil Code relative to the form of donations *inter vivos* do not apply to donations *inter vivos* of life insurance policies, or the naming of beneficiaries therein.³⁸

Since the passage of the Married Women's Emancipation Acts,³⁹ married women have had legal capacity to perform most legal acts for themselves. The wife seems to have full power to bind the community for necessities and in matters considered ordinary transactions of the community.⁴⁰ Even in extraordinary transactions the courts have been liberal in finding an agency relationship between husband, as head and master of the community, and wife,⁴¹ or in finding a ratification by the husband after learning of the wife's act.⁴² Although no case has been found in point, it would seem that the wife's procurement of an insurance policy, paying premiums with community funds, might be a valid and binding contract upon the community.⁴³ There is more than a possibility, however, that if a non-consenting husband learns of his wife's insurance contract soon after the policy's inception, he would be allowed to rescind it. But it seems both socially and economically desirable not to allow the husband to rescind a policy which has been in effect for a substantial period of time, or one of which he had knowledge and failed to act immediately to rescind it.

*b. Payable to the Insured's Spouse. — As early as 1871*⁴⁴

36. *Sizeler v. Sizeler*, 170 La. 128, 127 So. 388 (1930); *Grayson v. Life Ins. Co. of Virginia*, 144 So. 643 (La. App. Orl. Cir. 1932).

37. La. Acts 1940, No. 292, §§ 1, 2, now LA. R.S. 22:1521 (Supp. 1963): "Donations *inter vivos* of life insurance policies, and the naming of beneficiaries therein, whether revocably or irrevocably, are not governed by the provisions of the Revised Civil Code of 1870 or any other laws of this state, relative to the form of donations *inter vivos*."

"This Section does not effect a change in the laws of this state nor does it indicate that the laws relative to the form which donations *inter vivos* must take ever applied to donations *inter vivos* of life insurance policies or to the naming of beneficiaries therein."

38. The case of *Barone v. Williams*, 199 F.2d 189 (D.C. Cir. 1952) indicates the provisions of LA. CIVIL CODE art. 1491 (1870), which excludes proof of dispositions made because of hatred, anger, suggestion or captation, are inapplicable by reason of LA. R.S. 22:1521 (1950), and that proof that a change of beneficiaries had been procured by undue influence was admissible.

39. LA. R.S. 9:101-105 (1950).

40. See Comment, 25 LA. L. REV. 201 (1964).

41. *Ibid.*

42. *Ibid.*

43. *Cf. Bain v. Life & Cas. Ins. Co.*, 188 La. 290, 176 So. 129 (1937); *Succession of Emonot*, 109 La. 359, 33 So. 368 (1902); *Payton v. Jones*, 38 So. 2d 631 (La. App. Orl. Cir. 1949).

44. *Succession of Kugler*, 23 La. Ann. 455 (1871).

the rule was announced that the proceeds of a policy taken out during marriage by the husband and made payable to the wife became her separate property. The rule has been consistently followed⁴⁵ and extended by rejection of the community's demand for reimbursement of premiums paid.⁴⁶ The early courts offered no justification from the rules governing community property. One authority⁴⁷ has urged that the justification lies in the ability of the spouses to make donations to each other under the provisions of article 1746. However, the cases do not bear out this reasoning and even reject the application of the rules governing donations to life insurance.⁴⁸ Indeed, cases indicate that a life insurance policy is *sui generis* and governed by its own terms and judicial rules peculiarly applicable to it.

If, on the other hand, it is the wife who procures a policy payable to the husband, a theoretical objection is found to the application of the rule allowing the beneficiary to take the proceeds as separate property without the obligation of reimbursing the community the amount of the premiums paid to maintain the policy in force. The objection is that the husband, as head and master of the community, by mere consent to the act of the wife, would be able to convert community funds, in the form of premiums paid on the policy, into separate property, to be paid to him upon the death of the *cestui que vie*. Since the rationale of article 2408 seems to prohibit such an advantage to the husband, it may be that the community would be entitled to be reimbursed for the amount of the premiums paid.⁴⁹ However, it seems likely, in view of the modern trend of the court to view the wife as a nearly equal partner in the community, that no such exception to the settled rule will be pronounced.

c. Payable to the Insured's Estate. — The proceeds of a policy which is the separate property of the insured, made payable to his own estate, fall into the separate estate of the insured.⁵⁰

45. See *Douglas v. Equitable Life Assur. Soc.*, 150 La. 519, 90 So. 834 (1922), and cases cited therein, *id.* at 533, 90 So. at 839.

46. See *Kelly v. Kelly*, 131 La. 1024, 60 So. 671 (1913).

47. See 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY § 79 (1943).

48. See note 32 *supra*.

49. *Cf.* *Succession of Lewis*, 192 La. 734, 189 So. 118 (1939); *Succession of LeBlanc*, 142 La. 27, 76 So. 223 (1917); *Succession of Verneuille*, 120 La. 605, 45 So. 520 (1908); *In re Moseman*, 38 La. Ann. 219 (1886); *Succession of Bofenschen*, 29 La. Ann. 711 (1877); *Succession of McLellan*, 144 So. 2d 291 (La. App. 4th Cir. 1962). See notes 18 and 19 *supra*, and accompanying text.

50. *Succession of Lewis*, 192 La. 734, 189 So. 118 (1939); *Succession of Verneuille*, 120 La. 605, 45 So. 520 (1908); *In re Moseman*, 38 La. Ann. 219 (1886).

Although it does not necessarily follow, for the reason that the community is dissolved by the same event which brings the proceeds into being, the proceeds under a policy characterized as community property, payable to the insured's own estate, are also community property. This rule results from the theory of reimbursement, under which a spouse cannot appropriate community funds to his separate estate.⁵¹

B. When One Spouse Insures the Life of the Other in His Own Favor

The restrictions upon the ability of a spouse to enrich his own separate estate at the expense of the community estate would give community property status to the proceeds of a policy taken out by one spouse upon the life of the other, payable to himself.⁵² However, it is arguable that it is socially and economically desirable to allow the wife to protect herself by insuring the life of her husband in her own favor, the proceeds payable under the policy to be paid to the wife as her separate property.⁵³ Ratification of such transaction by the husband could be inferred from his conduct, such as submission to a physical examination, participation in premium payments, or even a simple failure to make timely objection to the wife's act, so that the proceeds of the community policy inure to the wife, when paid, as her separate property.

C. When the Beneficiary Intentionally Kills the Insured

In Louisiana forfeiture of goods to the state as a penalty for the commission of a felony has never been the rule. Neither, it

51. See Succession of Buddig, 108 La. 406, 408, 32 So. 361, 362 (1902) ("[The husband] has no right to transact so as to build up a separate estate to the disadvantage of the community. As to him, primarily all the property belongs to the community."); Succession of Farrell, 200 La. 29, 7 So.2d 605 (1942); *Berry v. Franklin State Bank & Trust Co.*, 186 La. 623, 173 So. 126 (1937); Succession of LeBlanc, 142 La. 27, 76 So. 223 (1917).

52. See note 51 *supra*, and accompanying text.

53. *Cf. Bain v. Life & Cas. Ins. Co.*, 188 La. 290, 176 So. 129 (1937). The wife took out two policies of accident insurance during the marriage; she suffered an accidental injury and brought suit in her own name. The insurer defended upon the grounds that the proceeds of an insurance policy procured during marriage were community funds, and that the husband, as head and master of the community, was the only person who could institute the action. The court held the wife's action was well founded. The decision has been weakened somewhat, however, by the fact that, in reaching its decision, the court relied upon the life insurance rule, particularly the case of *Douglass v. Equitable Life Assur. Soc.*, 150 La. 519, 90 So. 834 (1922), finding that the proceeds were the separate property of the wife. It seems that this latter point has been impliedly overruled by *Easterling v. Succession of Lamkin*, 211 La. 1089, 31 So.2d 220 (1947).

appears, is forfeiture to the other spouse of a spouse's interest in the community property a penalty for felony. However, it has been established by the jurisprudence that the beneficiary of a life insurance policy who feloniously takes the life of the insured is not entitled to the proceeds of the policy.⁵⁴ In *Succession of Butler*,⁵⁵ a wife found guilty of manslaughter of the insured husband was held to have forfeited her rights as beneficiary under the policy acquired during the marriage with community funds. Strength was added to this conclusion by the terms of the policy, which provided that if a beneficiary takes the life of the insured, the policy will be payable to the insured's estate. The court went further, however, and found that the proceeds were acquired by the insured's *separate* estate. The rationale of the court was that the husband, who had reserved the right to change beneficiaries, could nullify any right the wife might have to the proceeds by a mere change of beneficiaries: "a fortiori, the same result should follow where the policy provides for the change of beneficiary by her felonious killing of her husband."⁵⁶

The finding that the proceeds fall into the *separate* estate of the murdered husband simply does not follow from the court's major premise in the *Butler* case, that the husband, who had reserved the right to change beneficiaries, can nullify any right the wife might have to the proceeds by a mere change of beneficiaries. The well-settled rule in Louisiana is that the husband who takes out a policy during the marriage, and under which the proceeds are ultimately paid to his estate, will not take those proceeds into his separate estate, but rather the proceeds are counted as community property.⁵⁷ Thus, it is submitted that the proper result in *Butler* would have been a holding that the proceeds fell into the community, one-half of which the wife was entitled to as owner. It is seriously doubted, for example, that

54. See *American Nat'l Life Ins. Co. v. Shaddinger*, 205 La. 11, 16 So.2d 889 (1944), and cases cited therein.

55. 147 So.2d 684 (La. App. 4th Cir. 1962).

56. *Id.* at 686. The court continued: "In such event, the wife, having forfeited her right, the husband's separate estate becomes the beneficiary, *because his death dissolved the community*. Any property acquired by his estate after death belongs to his separate estate, not the community." (Emphasis added.) While logically supportable, the notion that the community cannot receive proceeds of a community policy after its dissolution was rejected in *Succession of Buddig*, 108 La. 406, 32 So. 361 (1902); *accord*, *Succession of Farrell*, 200 La. 29, 7 So.2d 605 (1942); *Berry v. Franklin State Bank & Trust Co.*, 186 La. 623, 173 So. 126 (1937); *Succession of LeBlanc*, 142 La. 27, 76 So. 223 (1917).

57. See cases cited in note 51 *supra*.

the wife who has killed her husband with the intent to come into full ownership of valuable community property, such as stocks or bonds, would be held to have forfeited her share in that same community property.

It can be argued, however, upon the analogy of life insurance to a donation *mortis causa*, that under article 1691, which provides for the automatic revocation of dispositions *mortis causa* when the legatee has unlawfully taken the life of the testator, and under article 966, which provides that such a person is also unworthy of inheriting from the deceased, the beneficiary who intentionally kills the insured, should not be entitled to receive any benefit whatsoever from the insurance contract. It is likely that the court in *Butler* was motivated by this notion of good social order.

But a dilemma in the *Butler* situation remains: should the code articles on donations be applied (though contracts of life insurance have been judicially characterized as *sui generis*), or a general principle, deducible from the Civil Code articles regarding community property?

D. *When the Community Is Dissolved by Divorce*

Policies of separate character will not be affected by divorce, thus this discussion presupposes a policy which is a community asset. Also, should the proceeds be payable to a spouse or a third person, the insured not having reserved the right to change beneficiaries, or should the proceeds be due under the policy, divorce would not affect the character of the proceeds. The following discussion is concerned only with the peculiar situation of a community policy, which is not indefeasibly payable, or whose proceeds are not due, to the other spouse or some third person.

Settlement of the community policy is likely to be made at the same time the remainder of the community is divided. Therefore, some method of voluntary division of the community life insurance policy between the spouses is desirable. Cases holding the community entitled to reimbursement for premiums paid to maintain a separate policy may be used to form the basis for division upon divorce. Thus, if one spouse manifests a desire to take the policy as his own, he could do so upon reimbursing the community for premiums paid, as if the policy

had always been his separate property. This sum would be easily determinable, and could be awarded by the court dissolving the community, and approving the community settlement.

A better solution seems to be settlement between the spouses for the cash surrender value of the policy.⁵⁸ This method of voluntary settlement has the advantages of ease of valuation, while offering the insured a choice whether to cash the policy in or to pay one-half of that amount to the former spouse and retain the policy as his separate property, thereby keeping the policy in effect.⁵⁹

An alternative method of valuation has been suggested as being more equitable.⁶⁰ Rather than the cash surrender value, the "actual value" of the policy is determined and apportioned between the spouses. This method reflects the insurability of the insured, by taking into account both his life expectancy and his health, at the time of the dissolution of the community. For example, a relatively new policy may have a very modest cash surrender value, or none at all. The premiums which have been paid may constitute a small sum. Either situation may occur

58. Although the case was reversed on other grounds, not pertinent here, the disposition made by the trial court in *Daigre v. Daigre*, 230 La. 472, 89 So.2d 41 (1956), is illustrative. There the husband had taken out a policy before marriage, and two policies during the marriage. All premiums during the marriage had been paid from community funds. Upon settlement of the community, the wife was given one-half of the premiums paid during the marriage on the policy taken out by the husband before the marriage, and one-half of the cash surrender value of the two policies acquired during the marriage. The Supreme Court had no criticism of this disposition by the trial judge.

59. This method of division between the spouses of a community life insurance policy upon divorce has been the subject of much litigation and judicial consideration and has received judicial approval in Texas because of its unique doctrine that insurable interest in life insurance must exist both at the inception of the policy and at its maturity. Since a spouse no longer has any insurable interest in his divorced spouse's life, he could not collect the proceeds in Texas after divorce. Thus, it is of the greatest necessity that a policy be divided in some manner at liquidation of the community, or it will be void. See *Equitable Life Assur. Soc. v. Hazelwood*, 75 Tex. 338, 12 S.W. 621 (1889).

That the cash surrender value method of partition should find favor in Louisiana may be noted from its consistency with the notion expressed in Civil Code article 2408: that when the separate property of one of the spouses has been increased in value during the marriage, the increase being due to common labor, expenses, or industry, the other spouse is entitled to the reward of one-half of the ameliorations.

60. See Huie, *Community Property Laws as Applied to Life Insurance*, 17 TEXAS L. REV. 121, 143 (1939). The author's principal criticism of reimbursement in the amount of one-half of the premiums paid is that the method fails to take into account the fact that part of the consideration for which the premiums had been paid had been received—namely, the protection which the insurance policy afforded during the marriage.

after the insured has suffered a stroke, or contracted a disease, which lessens his life expectancy, and thus increases the "actual value" of the insurance in force far in excess of its cash surrender value or the total amount of premiums paid.

If the parties fail to agree on the method of partition and valuation there seems to be no valid reason to deny the court the authority to decree a partition at the demand of either party and to determine the value of the policy in an equitable manner.

E. Onerous Transactions With a Life Insurance Policy

Assignments of life policies before maturity may be absolute or conditional. In the absolute assignment the assignor transfers his whole interest, thus entitling the assignee to the whole of the proceeds when payable. In the conditional assignment the intention is to secure a debt and the extent of the assignee-creditor's interest is measured by the debt.⁶¹ The surplus remaining over the amount of the debt will be paid to the contingent beneficiary, whether the insured's estate, his spouse or a third person.⁶²

The husband has specific power to dispose of community property under onerous title without the permission of the wife.⁶³ Consequently, he may validly assign a community life insurance policy for a consideration. No matter what the type of the assignment, the consideration received, whether movable or immovable, will be community property.⁶⁴ The validity of such an act by the wife has been discussed earlier⁶⁵ and it seems certain that the consideration received will fall into the community.

A more serious problem is created when the policy is the separate property of one of the spouses. Although no case has so held, it seems that the consideration received for the assignment of a separate policy assumes that character as if acquired by purchase or exchange.⁶⁶ This rule must be qualified to the

61. See VANCE, INSURANCE § 129 (3d ed. 1951).

62. *Ibid.*

63. LA. CIVIL CODE art. 2404 (1870).

64. See *Hogan v. Hall*, 118 F.2d 247 (5th Cir. 1941); *Douglass v. Equitable Life Assur. Soc.*, 150 La. 519, 90 So. 834 (1922); *Lambert v. Penn Mut. Life Ins. Co.*, 50 La. Ann. 1027, 24 So. 16 (1898). Although in each of these cases the assignee was in fact a creditor of the insured, in none does it appear that the assignment was intended to be merely collateral for the debt, but rather that the insured-assignor intended to part with the whole of his interest. See VANCE, INSURANCE § 129 (3d ed. 1951).

65. See notes 39-42 *supra*, and accompanying text.

66. The acquisition would be presumed community, but either spouse could prove its separate character. See Comment, 25 LA. L. REV. 95 (1964).

extent that if the assignor is the husband, and if he receives an immovable as consideration, the title must reflect the fact the husband used separate property to make the acquisition and he intended it to inure to his separate account.⁶⁷

In the case of the conditional assignment, to secure a debt, the surplus of the proceeds paid over the amount of the debt will be paid to the contingent beneficiary. There seems to be no valid reason for denying the application of the rule which characterizes the proceeds as community or separate property according to whom they are ultimately paid under the terms of the policy.⁶⁸

F. National Service Life Insurance

In 1940 Congress enacted the National Service Life Insurance Act⁶⁹ which has provided low cost life insurance to certain members of the active armed services of the United States for the protection of their dependents in a manner similar to the War Risk Insurance⁷⁰ of World War I. A National Service Life Insurance policy is a contract with the government, and its validity and interpretation present questions of federal law.⁷¹ Although a policy may be procured during the marriage and characterized as community property under state law, the community property rules of the state cannot have effect where there is a contrary congressional intent, even if the serviceman intends to deprive his wife of a right guaranteed by state law.⁷² It seems clear, however, that a state court called upon to determine ques-

⁶⁷. *Ibid.*

⁶⁸. See text accompanying notes 28-51 *supra*. Frequently, upon conditional assignment, the beneficiary is changed to the name of the creditor, "as his interest may appear," and payable secondarily to the insured's estate, his spouse, or a third person, as contingent beneficiary. See VANCE, *INSURANCE* § 123 (3d ed. 1951).

⁶⁹. 38 U.S.C. §§ 701-724 (Supp. 1959). The National Service Life Insurance Act of 1940 was repealed and re-enacted as part of Title 38, United States Code, by the Act of September 2, 1958, 72 Stat. 1105, effective January 1, 1959. It is a system of low cost, dividend sharing, life insurance enacted for the protection of dependents of servicemen in active military service during World War II and the Korean War. Its counterpart of World War I was War Risk Insurance. National Service Life Insurance is also distinguishable from United States Government Life Insurance and the gratuitous Korean War indemnity benefits. This paper is concerned only with National Service Life Insurance because of the predominant role it plays in government insurance. See generally KIMBROUGH & GLEN, *AMERICAN LAW OF VETERANS* § 418 (2d ed. 1954).

⁷⁰. 38 U.S.C. §§ 740-760 (Supp. 1959).

⁷¹. *Pack v. United States*, 176 F.2d 770 (9th Cir. 1949).

⁷². *Wissner v. Wissner*, 338 U.S. 655 (1950). There, the serviceman had named his mother as beneficiary, the policy having been purchased with community funds. In California, the wife has a vested interest in one-half of the pro-

tions of succession rights and community settlements upon divorce should apply usual community property principles in all areas where the federal statute has not expressed a contrary principle,⁷³ and in most cases National Service Life Insurance will be treated just as commercial life insurance.

Under the United States Supreme Court's interpretation of the National Service Life Insurance Act the proceeds of such a policy are payable to the beneficiary as his separate property.⁷⁴ This result, of course, is in accord with the Louisiana jurisprudence.⁷⁵ The unresolved question is the character of the proceeds where payable to the insured's own estate. Under the provisions of 38 U.S.C. section 717(d), proceeds are payable to the insured's estate when: (1) the insured has so designated; (2) no beneficiary is designated, or the designated beneficiary does not survive the insured; or (3) a designated beneficiary entitled only to installment settlement survives the insured, but dies before receiving all sums due and payable. Although there are no Louisiana cases dealing with a National Service Life Insurance policy, a case considering this problem under the similar War Risk policy found no conflicting federal statute and applied the rule applicable to ordinary commercial insurance.⁷⁶

G. Annuity Contracts

The annuity contract contemplated by Louisiana Civil Code articles 2793-2800 is an extremely limited type of annuity, by which one person engages to pay a periodic annuity to another

ceeds of such a community policy, even though the insured has reserved the right to change beneficiaries. The Court held that Congress had made clear its intent to allow a serviceman to select the beneficiary of his own government life insurance policy regardless of state law, even when it was likely that the husband intended to deprive his wife of a right to share in his life insurance proceeds, a right guaranteed by state law. See Comment, 47 CALIF. L. REV. 374 (1959); *cf.* *Free v. Bland*, 369 U.S. 663 (1962). *But see* *Yiatchos v. Yiatchos*, 84 Sup. Ct. 742 (1964).

73. See *Estate of Allie*, 50 Cal. 2d 794, 329 P.2d 903 (1958).

74. *Wissner v. Wissner*, 338 U.S. 655 (1950).

75. See cases cited in notes 29 and 45 *supra*.

76. *Succession of Jones*, 185 La. 377, 169 So. 440 (1936). During his marriage, the husband took out a War Risk insurance policy making his mother the beneficiary. He directed that the proceeds were to be paid in installments during the life of the beneficiary, any balance to be paid to the estate of the insured. After the death of the insured and the beneficiary, a dispute arose between the wife and heirs of the husband as to the character of the proceeds paid to the deceased's estate. The court held, in accordance with prior jurisprudence, that the proceeds of a community property policy, paid to the estate of the deceased, fell into the community. Thus, the wife was entitled to one-half as survivor in community.

in exchange for a sum of money which the lender agrees not to claim.⁷⁷ It may be assimilated to a loan on interest, but is distinguishable in that the sum is not due to be repaid, so long as the annuity is paid.⁷⁸ The courts have determined that the code definitions are not exclusive⁷⁹ and there is nothing which prohibits an annuity contract different from that contemplated by the Code.⁸⁰

The common form of annuity contract, as developed in the common law,⁸¹ is entirely different from a life insurance policy. A lump sum is paid to the insurance company immediately and the annuitant receives the annuity payments so long as he lives. It is therefore opposite from life insurance, where the insured pays a periodic payment and a beneficiary receives a lump sum. It has become popular for annuity contracts to provide for total repayment, or a substantial portion thereof, of the sum paid for the annuity in the event of the annuitant's premature death. Thus, the annuitant often names a beneficiary to whom this payment will be made. This contract is the refund annuity, and, although payable at death, it does not constitute insurance.⁸² The annuity may be issued on a group basis, thus allowing employers to contribute to a satisfactory retirement fund for employees.⁸³

It is clear that an annuity contract is an incorporeal, movable thing, susceptible of being characterized as either community or separate property.⁸⁴ The rule developed in the life insurance cases that the contract's character depends upon whether it was acquired before or during the marriage is applicable to the annuity contract itself and to any payments made to the annuitant himself.⁸⁵ The rationale of this determination is more likely the general rule expressed by article 2402 than the analogy to life insurance.

77. LA. CIVIL CODE art. 2793 (1870): "The contract of *annuity* is that by which one party delivers to another a sum of money, and agrees not to reclaim it so long as the receiver pays the rent agreed upon."

78. See 2 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) nos. 2089-2095, 2114-2139 (1959).

79. Succession of Cotton, 172 La. 819, 135 So. 368 (1931).

80. Succession of Rabouin, 201 La. 227, 9 So.2d 529 (1942).

81. See VANCE, INSURANCE § 200 (3d ed. 1951).

82. See, e.g., Succession of Pedrick, 207 La. 640, 21 So.2d 859 (1945); Succession of Rabouin, 201 La. 227, 9 So.2d 529 (1942).

83. See Messersmith v. Messersmith, 229 La. 495, 86 So.2d 169 (1956). See generally VANCE, INSURANCE § 200 (3d ed. 1951).

84. Messersmith v. Messersmith, 229 La. 495, 86 So.2d 169 (1956).

85. *Ibid.*

The analogy to life insurance is clearly not applicable in the situation presented by *Succession of Rabouin*.⁸⁶ There the deceased had a number of annuity contracts providing that any unpaid balance at the time of his death was payable to a favored child. When that sum was added to the other dispositions to the child, the total exceeded the disposable portion, and the other forced heirs objected. The beneficiary urged that the proceeds were the same as life insurance, and thus her property and not part of the deceased's estate. The court rejected this contention, drawing a distinction between life insurance proceeds and proceeds payable under an annuity contract. It seems clear from the *Rabouin* rationale that, if the beneficiary had been the surviving spouse, that spouse would not have been able to claim the proceeds as her separate property.

Because of the peculiar character of the annuity contract as a purchase of a right to the periodic payment of income for life, it is not unlikely that a spouse will desire to bind only his separate estate to the contract. There is no case in point, but it would seem, although one writer has urged the analogy to immovables,⁸⁷ that the correct interpretation is by assimilation to movables, wherein either spouse would be entitled to prove the separate character of the contract by showing it was entered into with separate funds, and with the intention that the contract would be separate property.⁸⁸

II. PROPERTY INSURANCE

Since the basis of the contract of insurance on property is indemnity or restoration of a loss to property,⁸⁹ the cases have announced the general rule that the proceeds of a property insurance contract will take on the character of the property to be

86. 201 La. 227, 9 So.2d 529 (1942).

87. Comment, 17 LA. L. REV. 810 (1957).

88. See discussion at note 26 *supra*.

89. See VANCE, INSURANCE § 14 (3d ed. 1951). The contract of property insurance is a personal contract between the insured and the insurer. *Id.* § 13. Although under the provisions of LA. CIVIL CODE arts. 460, 470, 475, 870 (1870), the contract can be classified as property, in the sense of an incorporeal, movable thing, it is aleatory in character, and of no value to anyone who does not have insurable interest in the subject-matter. In the event of dissolution of the community by divorce, the policy of property insurance could not be divided between the spouses in the same manner as a life insurance policy. It is therefore unnecessary to characterize the contract of property insurance itself as either community or separate property and this discussion will be limited to characterization of the proceeds of such a policy upon the occurrence of the event insured against.

restored or indemnified.⁹⁰ Thus, when one spouse procures fire insurance on a building belonging to the community and pays the premiums from community funds, he does so for the benefit of the community estate, and proceeds payable under the policy will inure to the community. When separate property is insured through the use of separate funds, the proceeds payable in event of fire, or other event insured against,⁹¹ are separate property.

A different problem arises when either community funds are used to insure separate property or separate funds are used to insure community property. There are two possible solutions: first, in conformity with the general rule, the proceeds take on the character of the property to be indemnified or restored, and the other estate, which has contributed to the payment of the premiums is entitled to reimbursement in the amount of its contribution; second, the proceeds may be considered as separate or community in the proportion that the funds used to pay premiums bear to the total amount recovered. This solution would result in a mixed title to the property restored,⁹² and is objectionable for that very reason. The former solution has found favor in Louisiana, and does not necessitate the formulation of an exception to the general rule.

An exception to the ancillary right of reimbursement in certain cases may be found, however, if a separate piece of property is used exclusively for family purposes. For example, when one spouse owns a house in his separate right, but allows the family to live there, it seems that the community ought to bear the burden of the property insurance premiums and would have no claim for reimbursement.⁹³ Another situation which seems to

90. *Thigpen v. Thigpen*, 231 La. 206, 91 So.2d 12 (1956). See *Hall v. Tous-saint*, 52 La. Ann. 1763, 28 So. 304 (1900); MCKAY, *COMMUNITY PROPERTY* § 468 (2d ed. 1925).

91. In addition to the peril of fire, the owner of immovables or movables will desire to protect his property against other perils such as lightning, hail, earthquake, explosion, riot, rain, smoke, and a variety of others. Insurance companies have undertaken to provide coverages for most of the known risks to property, and have done so by providing a vast number of policies, forms and clauses. See generally MEHR & CAMMACK, *PRINCIPLES OF INSURANCE* 275-305, 418-33 (3d ed. 1961).

92. See *Love v. Robertson*, 7 Tex. 6 (1851); MCKAY, *COMMUNITY PROPERTY* § 407 (2d ed. 1925). For a discussion of the Texas view as compared to the Louisiana view, see Huie, *Separate Ownership of Specific Property Versus Restitution from Community Property in Louisiana*, 26 TUL. L. REV. 427 (1952).

93. See *Thigpen v. Thigpen*, 231 La. 206, 91 So.2d 12 (1956); see *Godchaux & Mayer v. Richardson*, 123 So. 178 (La. App. Orl. Cir. 1929) (insurance on wife's separate automobile); cf. *Sharp v. Zeller*, 110 La. 61, 34 So. 129 (1902); *Succession of Boyer*, 36 La. Ann. 506 (1884).

merit an exception to the general rule is suggested by the third paragraph of article 2334:⁹⁴ a wife who is living separate and apart from her husband and is engaged in a separate business. Since the Civil Code provides that the earnings thus derived are the separate property of the wife, it seems only fair that she should bear the burden of the property insurance premiums on a building belonging to the community in which she conducts her business.

As the character of the property insured against damage or destruction by fire is of little concern to the insurer, the legislature simplified the issues between the insured and the insurer by removing the necessity of testing ownership of the property as between husband and wife. Act 158 of 1936⁹⁵ provides that it is not a defense to an insurer that the policy was issued in the name of one of the spouses when the property was that of the community or that of the unnamed spouse. This statute seems not to apply when the community has been dissolved and the property given in full ownership to one spouse, as the other could not then meet the requirement of insurable interest in the property.

III. HEALTH INSURANCE

Health insurance is designed to pay the cost of hospital and medical expenses, and to indemnify the insured for loss of income arising out of accidental injury or sickness.⁹⁶ As the coverage may include protection against expenses incurred from accident or sickness, or the disability which may result from either, it is not completely analogous to either life or indemnity insurance. It is true that disability and accident benefits are often included as part of a life insurance contract; and certain insurance doctrines such as representation, concealment, warranty, waiver and estoppel are applicable to both life and health insurance contracts.⁹⁷ However, an important distinction be-

94. LA. CIVIL CODE art. 2334 (1870), in part: 'The property of married persons is divided into separate and common property

"The earnings of the wife when living separate and apart from her husband although not separated by judgment of court, her earnings when carrying on a business, trade, occupation or industry separate from her husband, actions for damages resulting from offenses and quasi offenses and the property purchased with all funds thus derived, are her separate property."

95. La. Acts 1936, No. 158, has been re-enacted without substantial change and now appears as LA. R.S. 22:693 (1950). See Comment, 12 TUL. L. REV. 131 (1937).

96. See MEHR & CAMMACK, PRINCIPLES OF INSURANCE 472-504 (3d ed. 1961).

97. See, e.g., VANCE, INSURANCE § 179 (3d ed. 1951).

tween life and health insurance, and one which closely allies the latter to indemnity insurance, is that health insurance is a form of agreed compensation for an actual loss. The proceeds are payable during the life of the *cestui que vie* and are designed to be used to pay his medical expenses and replace lost income. The fact that the insured may vary the amount of the benefits which would be due upon the occurrence of the event insured against does not spoil the analogy to restoration of lost wages during the existence of the disability.

In *Easterling v. Succession of Lamkin*⁹⁸ a life insurance policy which incorporated disability benefits was taken out by the husband before marriage. After marriage, the insured changed beneficiaries under the life benefit, naming his wife. The insured became afflicted with serious ailments, which caused total disability. Five years later he died. The insurer failed to pay the disability benefits due under the policy until after the insured's death, and a dispute arose over this sum which required the court to determine the character of the funds as either separate or community. The heirs of the deceased urged application of the life insurance rule which would place the disability proceeds in his separate estate. The court recognized the applicability of the life insurance rule to the proceeds of the death benefit, for it found that they became the separate property of the wife as named beneficiary, but refused to apply that rule to the disability proceeds, finding that they fell into the community. The court reasoned that the disability payment was "in lieu of or as compensation for the loss of earning capacity of the insured."⁹⁹ Thus, the policy remained the separate property of the husband, but when the proceeds were paid under the disability provision, as indemnification for lost wages, the proceeds took on the character of the lost wages, which were clearly community.¹⁰⁰

98. 211 La. 1089, 31 So. 2d 220 (1947).

99. *Id.* at 1099, 31 So. 2d at 224.

100. See LA. CIVIL CODE art. 2402 (1870). The opinion in *Easterling* failed to discuss the earlier case of *Bain v. Life & Cas. Ins. Co.*, 188 La. 290, 176 So. 129 (1937), in which a wife, during the existence of the community, took out a policy of accident insurance in her own name, and was found to be entitled to the proceeds as her separate property, the court relying on the life insurance rule for its holding. It seems that the *Bain* case has been impliedly overruled at least to the extent that the proceeds will no longer become the separate property of the wife, but will fall into the community. It still seems possible for the wife, who is the named beneficiary, to bring the action for the proceeds; but if she is to benefit solely as a dependent member of the community, she must defer to the action of the husband, as the head and master of the community. See *Sanders v. P. & S. Ins. Co.*, 125 So. 2d 24 (La. App. 2d Cir. 1960).

CONCLUSION

A great cleavage runs between contracts designed to indemnify against a loss of property and contracts which are not of indemnification, such as life insurance. Health insurance contracts, for purposes of characterization of their proceeds as community or separate, fall on the side of the indemnity policies, and annuity contracts, on the side of those not designed to indemnify.

In most situations concerning non-indemnity policies the characterization as separate or community property must be made of both the policy and the proceeds. Notwithstanding the characterization of the policy itself, if the proceeds are ultimately paid to the insured's spouse or to some third person, they become the payee's separate property. When a policy is taken out before marriage and, upon the death of the insured, the proceeds are payable to the estate of the insured, the estate takes the proceeds as separate property. If payments to sustain it are made during marriage from community funds, the community is entitled to be reimbursed for premiums paid, as the policy at all times belonged to the separate estate of the insured. If, on the other hand, the policy is acquired during the marriage, the policy itself would be community property, and the proceeds paid to the insured's estate would inure to the community. A method of valuation of policies which are community property is necessary in the event of divorce and community settlement; partition at the cash surrender value seems to be the prevailing method.

The proceeds of a property insurance contract will assume the same character as the property indemnified. If community funds are used to acquire indemnification insurance on separate property, the community is entitled to be reimbursed for the amount of the premiums paid with the possible exception of separate property being used exclusively for community purposes.

Health insurance proceeds are characterized in the same manner as indemnification insurance, by ascertaining the character of the property lost or the debts incurred, notwithstanding the fact that accident and disability benefits are usually found in life insurance contracts.

Confusion has frequently resulted from attempted application of Civil Code provisions in some situations and from abstention, express or implied, in others. Particularly in the area of donations, the courts have taken the position that the contract is *sui generis*, and thus the court is free to search for the best solution. It is submitted that all contracts of insurance should be so treated, and that the principles of community property law should have little or no application outside the preliminary characterizations which do not conflict with settled principles of insurance law.

Richard B. Wilkins, Jr.

CONTROL AND MANAGEMENT OF THE COMMUNITY

"The husband is the head and master of the partnership or community of gains."¹ This traditional language has been used in each Louisiana Civil Code to give the husband control and management of the community.² However, the extent of the husband's power over the community has changed greatly since 1808. More and more restrictions on the husband's power to deal freely with community property have been added to protect the interests of the wife. This Comment examines the scope of the husband's authority over the community under present law and the remedies by which the wife may protect her interest.

HISTORICAL INTRODUCTION

There were two aspects of the husband's powers in the system of control and management established by the 1808 Code. First, he dealt with community property as owner;³ second, the wife could not interfere with the husband's management as she lacked capacity to perform most juridical acts without the husband's authorization.⁴ Unauthorized acts of the wife were relative nullities which the husband could set aside.⁵ The articles

1. LA. CIVIL CODE art. 2404 (1870).

2. *Ibid.*; La. Civil Code art. 2373 (1825); La. Civil Code p. 336, art. 66 (1808).

3. See La. Civil Code p. 336, art. 66 (1808); cf. LA. CIVIL CODE art. 2404 (1870).

4. See La. Civil Code p. 28, art. 22 (1808), dealing with the wife's incapacity to contract, now appearing as LA. CIVIL CODE art. 122 (1870); La. Civil Code p. 28, art. 21 (1808), dealing with the wife's inability to appear in court, now LA. CIVIL CODE art. 121 (1870).

5. See La. Civil Code p. 28, art. 28 (1808); LA. CIVIL CODE art. 134 (1870).